IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-826**

ELLSWORTH H. MOSHER,
*Petitioner*

*v.*

HON. HOWARD T. MARKEY
HON. GILES S. RICH
HON. PHILLIP B. BALDWIN
HON. DONALD E. LANE
HON. JACK R. MILLER
The Chief Judge and the Associate Judges of the United States Court of Customs and Patent Appeals

and

CHIRANJIB K. SARKAR,
*Respondents*

## PETITIONERS REPLY UNDER RULE 24(4) TO MEMORANDUM FOR THE RESPONDANT JUDGES

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January, 1979

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### I. PETITIONER HAS STANDING IN THIS COURT

The respondent judges suggest that petitioner lacks standing to file his petition for certiorari. Petitioner's right (and standing) to file a petition for certiorari is not

based upon whether he intervened in the Sarkar appeal and asked for consideration of the merits in that case, but rather from the denial of the Court of Customs and Patent Appeals of *his own petition* for access to the court record and for attendance at the oral hearing. More is involved here than "an abstract concern with a subject that could be effected by an adjudication" and does result in a "concrete injury required by Art. III" because the action complained of here (and forming the basis for the petition) was the denial of petitioner's motion in the Court of Customs and Patent Appeals (1) to have the *Sarkar* record opened and (2) to permit petitioner to attend the oral hearing. No ruling was sought seeking to intervene and present arguments involving the *merits* of the Sarkar case.

The concern over jurisdiction in this Court is wholly unfounded. The memorandum for the respondent judges overlooks the fact that petitioner here is seeking relief from the lower court's denial of a request *by petitioner* for access to copies of the lower court records which, in direct appeals from the Patent Office, have *always* been available for inspection and copying by anyone up until May of last year. If there should be any doubt as to this Court's jurisdiction under the plain words of 28 U.S.C. §1256, it would be dispelled by the old case of *Boyden v. Burke* [*Commissioner of Patents*], 14 How. (55 U.S.) 575, where as long ago as 1852 this Court intervened on behalf of a person seeking copies of public records, and in effect, supported the right of access. As stated at 14 How. at page 583:

> "These records being in the care and custody of the Commissioner of Patents, it is his duty to give authenticated copies to any person who shall demand the same, as soon as he conveniently can, on payment of the legal fees."



If for "Commissioner of Patents" we read *C.C.P.A.*, we have to all intents and purposes the present case.

Petitioner did not participate in the proceeding below as a "non-party". Indeed, he was not permitted to participate in any way due to the action of the Court of Customs and Patent Appeals and it is this action by the CCPA which forms the basis of this petition.

## II. THE ACTION COMPLAINED OF SHOULD BE REDRESSED IN THIS COURT

Petitioner has never sought to intervene as a *party* to the Sarkar appeal. Sarkar is named as a respondent because he invoked Rule 5.13(g) while pursuing an appeal in an Article III court in an attempt to convert a trade secret into a patent grant. Secrecy for such a reason has not been granted before and for good reason; the courts have always before been open in such direct appeals.

There is nothing in CCPA Rule 5.13(g) which suggests that it can be used *carte blanche* to circumvent an established practice of the past 139 years involving open court proceedings when someone is trying to convert his trade secret to a patent grant. The present matter involves the trade secret/patent interface and not an ordinary trade secret situation as covered or dealt with in the *Kewanee* case. It is suggested in the memorandum for the respondant judges that CCPA Rule 5.13(g) is merely an analogue to Fed. R. Civ. P. 26(c)(7). The latter rule involves practice during pretrial depositions and not a direct patent appeal in an Article III court where the *sole* basis of the action is to seek an exclusionary right by patent.

It is also suggested in the memorandum for the respondant judges that it would be "anomalous" to force

an applicant to risk forfeiture of his trade secret in trying to secure a patent by appeal to the CCPA. This risk has been run in every direct patent appeal heard in that court (and its predecessors) save this one for 139 years. The rule as interpreted here violates petitioner's constitutional rights (and the rights of the public at large) granted by the First, Fifth, Ninth, or Tenth Amendments.

It is therefore respectfully submitted that a writ of certiorari issue to redress this matter.

Respectfully submitted,

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